Neutral Citation Number: [2025] EWHC 490 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Date: 4th March 2025

Before :
MR JUSTICE RITCHIE

- -

BETWEEN

Appeal Ref: KA-2025-BHM-000002 &
CH-2023-BHM-000032
Claim No. J30BM090

STUART ANGEL AND 1379 OTHERS

Claimants/ Appellants

and

BLACK HORSE LIMITED

Defendant/Respondent

Appeal Ref: CH-2023-BHM-000033
Claim No: J30BM091

PETER GREEN AND 234 OTHERS

Claimants/Appellants

and

CLOSE BROTHERS LIMITED

Defendant/Respondent

Appeal Ref: CH-2023-BHM-000034
Claim No: J30BM092

SEAN HALLSOR AND 28 OTHERS

Claimants/Appellants

and

ALDERMORE BANK PLC

Defendant/Respondent

Appeal Ref: CH-2023-BHM-000035
Claim No: J30BM093

CARL THOMAS AND 1545 OTHERS

Claimants/Appellants

and

VOLKSWAGEN FINANCIAL SERVICES (UK) LIMITED

Defendant/Respondent

Appeal Ref: CH-2023-BHM-000036
Claim No: J30BM094

JOSE FERNANDES AND 177 OTHERS

Claimants/Appellants

and

STARTLINE MOTOR FINANCE LIMITED

Defendant/Respondent

Appeal Ref: CH-2023-BHM-000037
Claim No: J30BM095

ANDREW BARLOW AND 180 OTHERS

Claimants/Appellants

and

VAUXHALL FINANCE PLC (1)
STELLANTIS FINANCIAL SERVICES UK LIMITED (2)

Defendants/Respondents

Appeal Ref: CH-2023-BHM-000038
Claim No: J30BM096

RICHARD BATESON AND 1650 OTHERS

Claimants/Appellants

and

BMW FINANCIAL SERVICES (GB) LIMITED

Defendant/Respondent

Appeal Ref: CH-2023-BHM-000039
Claim No: J30BM097

PETER LAMOND AND 1001 OTHERS

Claimants/Appellants

and

MOTONOVO FINANCE LIMITED

Defendant/Respondent

Lawyers:

David Cavender KC and Andrew Clark of counsel (instructed by **Barings Ltd**) for the **Appellants/Claimants**

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Simon Popplewell of counsel (instructed by **Lester Aldridge LLP**) for the **Respondents/Defendants: Volkswagen FSL and BMW FSL**

Jonathan Kirk KC and Lee Finch of counsel (instructed by **Equivo Ltd**) for the **Respondents/Defendants: Vauxhall FP and Stellantis FSL**

Hearing dates: 19th &20th February 2025

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.00am on Tuesday 4th March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Ritchie:

The appeal

1. This appeal relates to omnibus claim forms, not GLOs. It relates to case management for multi-party litigation concerning the same or similar subject matter. By "omnibus claim form", I mean a single claim form issued by many claimants.

2. I should say at the start that these claims have been stalled in procedural wrangles for over 2 years. Many of the issues arose out of guesswork because no Defendant pleading has been served. I raise the suggestion here that r.7.3 and r.19.1 issues might better be decided after a generic particulars of claim and a generic defence is served and limited disclosure of key documents is provided. In these claims those would be the consumer credit agreements and the brokerage agreements between lenders and dealers/brokers and accompanying leaflets.

3. Eight claim forms were issued which, by schedules of names, covered over 5,800 Claimants bringing claims against 8 motor finance companies. In every claim the Claimants assert that each Defendant arranged in advance for a broker determined variable commission to be paid to brokers or dealers under circumstances which were undisclosed and unfair within the meaning of S.140A of the *Consumer Credit Act 1974* (CCA).

4. This is an appeal from the case management decisions of HHJ Worster (the Judge), made at Birmingham County Court, which he explained in a judgment dated 8.9.2023 and later in another judgment dated 10 November 2023. On 24.11.2023 the Judge ordered that each Claimant must issue a separate claim form (3 months after the date of determination of this appeal) or they would be struck out, and made consequential directions and costs orders. The Judge had already given the Claimants permission to appeal a month earlier, on 11.10.2023. By notices of appeal dated 30.10.2023 the Appellants seek, in 4 grounds, to overturn the decisions to sever the claims and the directions made consequent thereto.

5. The Court was provided with an appeal bundle, an authorities bundle, a second authorities bundle the day before the hearing and skeleton arguments, then two further authorities near the end of submissions. There was no evidence in the appeal bundle, so the appeal was based on legal argument. The case management decisions were based on evidence in witness statements and legal argument.

The issue – severance or continuing joinder at this stage

6. The Claimants/Appellants submit that all claims can and should conveniently be disposed of in the same proceedings under the 8 omnibus claim forms and the Judge was wrong to sever them at this stage. The Defendants/Respondents submit that the

claims cannot be conveniently disposed of in the same proceedings and the Judge was right to sever them.

The CPR

7. The relevant Civil Procedure Rules (CPR) are rs.1.1 (the overriding objective), and rs.7.3 and 19.1 (multi-party claim forms). I set the last two out here, right at the start:

CPR r.7.3 provides:

> "**Right to use one claim form to start two or more claims**
> 7.3 A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings."

CPR Part 19 deals with group litigation orders (GLOs) and omnibus claim forms, along with PD19B. The main parts relating to GLOs are set out in rules 19.r.21-26 and are summarised by the Master of the Rolls in *Morris* (cited below) between paras. 21 and 28. In relation to omnibus claim forms, r.19.1 provides:

> "**Parties – general**
> 19.1 Any number of claimants or defendants may be joined as parties to a claim."

Appeals - CPR r. 52

Review of the decision

8. Under CPR r. 52.21 every appeal is a review of the decision of the lower Court unless the Court decides otherwise (or a Regulation or Act provides that it is a rehearing) and will only be granted if the decision below was wrong or unjust due to a serious procedural or other irregularity.

9. If the appeal is granted this Court has wide powers to set aside the decision below or substitute a fresh decision.

Appeals against case management decisions

10. Appeals from case management decisions have a high threshold test. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ. 1537, at [52] the Master of the Rolls said:

> "We start by reiterating a point that has been made before, namely that this Court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ. 1667 at [18] Lewison LJ said: "it has been said more than once in this Court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance judges."

11. In *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ. 1258, the test in considering an appeal against a decision of this nature was neatly encapsulated by Sir Terence Etherton MR at paragraph 68:

> " … The fact that different judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable."

12. In *Royal & Sun v T & N* [2002] EWCA Civ. 1964, Chadwick LJ enunciated the first deferential principle thus:

> "37. … these are appeals from case management decisions made in the exercise of his discretion by a judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate Court should respect the judge's decisions. It should not yield to the temptation to "second guess" the judge in a matter peculiarly within his province.
> 38. I accept, without reservation, that this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

I take into account the authorities relied on by the Respondents: *Assicurazioni v Arab Insurance* [2002] EWCA Civ. 1642 at para. 9 and *Abdulle v Commissions of Police* [2016] 1 WLR 898, at para. 28, but neither expressed the principles better than the above authorities.

Chronology of the action

13. In November 2022 the 8 claim forms were issued by the same firm of lawyers (Barings). The claims were grouped together by Defendant. They all had the same wording. The Claimants sought to reclaim the sums paid over to the Defendants under S.140B(1)(a) of the CCA because they alleged that the Defendants or their dealers or credit brokers had failed to disclose commissions before the Claimants entered consumer credit finance contracts. 8 sets of generic Particulars of Claim (POC) were later served. They are not exactly the same but are similar. All were drafted by the same barrister. Some have 42 paras, others 27, 28 or 38. The POC in *Angel* are a useful place to start. In broad summary Mr Angel asserted that he went to a car dealership to a buy car, wanted

credit to assist his purchase, was referred to a credit broker to arrange the finance (or the dealer arranged it), then entered the offered credit agreement, receiving a loan at an interest rate. Prior to this agreement the lender (the Defendant, *Black Horse*) had made a brokerage agreement with the broker or car dealer under which the latter gained commission which was variable according to the interest rate set for the consumer by the broker/car dealer within parameters set by the lender. I shall call this a **Discretionary Commission (DC)** agreement. Mr Angel asserted that before making the recommendation to him the broker or dealer should have disclosed the DC which it would receive from the Defendant. In particular, it is pleaded that the adjustable interest rates created an adjustable commission payable to the broker/dealer which created a conflict of interest with Mr Angel. In simple terms, the consumer would benefit from the lowest possible interest rate and the broker/dealer would profit most from the highest possible interest rate. The Claimants relied on various guidance issued by the Office of Fair Trading (OFT) and later (from April 2014) rules and guidance issued by the FCA (Financial Conduct Authority), called CONC (Consumer Credit Sourcebook). Some Claimants in some of the claims had credit agreements which were unregulated. Each Claimant reclaimed all the sums paid over or the difference between what they should have paid and what they did pay, plus interest.

14. Just considering the POC, as they are at the moment, they are generic. They make, inter alia, 13 main common allegations that:

(i) Each Claimant entered a consumer credit agreement to buy a car and each agreement was subject to S.140A of the CCA.
(ii) Each Defendant was a lender subject to regulatory conduct guidance from the OFT or the FCA (or in a few cases no guidance).
(iii) Each Defendant had made a written brokerage agreement with each dealer or credit broker before the credit agreement was entered by the Claimant.
(iv) Each brokerage agreement provided that the broker/dealer could offer loans and decide the level of interest paid by the Claimant on the loan and the level of interest would determine the amount of commission the broker/dealer would receive (the DCs).
(v) The DC was not justified by the level of work done by the brokers/dealers.
(vi) The brokers/dealers recommended each Defendant's loan to each Claimant.
(vii) The brokers/dealers did not tell the Claimants about their ties to the Defendants or the commission or the DC or the conflict of interest caused by the DC and did not set them out in leaflets given to the Claimants.
(viii) Each Claimant accepted the loans offered and entered consumer credit agreements.
(ix) Each Defendant then paid the DC to the brokers/dealers.
(x) The various regulatory systems (initially the OFT and later the FCA) provided rules of conduct for lenders and brokers/dealers to highlight unfair practices and broadly provided, inter alia, the requirement on brokers/dealers to disclose their ties to lenders and the existence and nature of any commission so that the

borrower would understand any conflict of interest arising. Other matters were also pleaded. The wording of the OFT and the FCA guidance was different.

(xi) Each Defendant should ensure that brokers/dealers complied with their regulatory obligations and failed to do so.

(xii) The communications between the brokers/dealers and the Claimants were antecedent negotiations caught by S.56 of the CCA so the brokers/dealers were treated as the Defendants' agents and the Defendants were liable for their conduct.

(xiii) From 28.1.2021 DC brokerage agreements were prohibited.

15. The generic POC do not contain:

(i) Any facts and matters relating to each Claimant's credit contract, any dates, any sums borrowed, any interest rates, any car price details etc.;

(ii) Any brokerage agreements made between the lenders and the dealers or brokers;

(iii) Any facts and matters relating to each Claimant's personal circumstances or sophistication concerning finance;

(iv) Any sums claimed.

No POCs specific to the individual claims have yet been served. No generic defence and no individual defences have been served. So the general issues arising from the generic claim form and the specific issues in each claim are not yet identified. This is one reason why things have become so bogged down, the parties are arguing over what the issues might be. The Claimants are having to guess what defences the Defendants will take. The Defendants are refusing to say what will be in issue. So, whichever way forwards these claims go, disclosure of the brokerage agreements, credit agreements and specific particulars relating to each claim or at least some claims will be needed, then specific POCs and defences, then witness evidence.

16. I shall ignore the application to transfer the *Barlow* claims to the High Court because this was dismissed and the appeal relating to it was dismissed by consent.

17. In November 2022, soon after the claims were issued, the Defendants raised the issue that the claims should be severed, separately issued and served. Witness statement evidence was put before the Judge. No applications for severance were issued. So this is all case management. Directions were given. The hearing listed for early 2023 was adjourned and the CMC at which the severance issues was decided took place in May 2023, with a draft judgment sent out, then following the final decision of the Divisional Court in *Abbott* (cited below), the Judge allowed further written submissions arising from that judgment and issued the judgment in early September 2023 based on the guidance given in *Abbott* (to which I shall return).

Pleaded Law and Guidance relating to the generic cause of action

18. So that the background and the detail can be understood I set out below some (but not all) of the relevant CCA sections relied on and some of the clauses in CONC which are pleaded and relied on by the Claimants. Other regulatory guidance was also pleaded but it is not necessary for me to set it all out here. The Parties inform me that the CONC guidance in my bundle was NOT that applicable at the relevant times, it was that issued after January 2021.

> **The CCA**
> “**S 140A Unfair relationships between creditors and debtors**
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—
> (a) any of the terms of the agreement or of any related agreement;
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).”
>
> **“140B Powers of court in relation to unfair relationships**
> (1) An order under this section in connection with a credit agreement may do one or more of the following–
> (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
> (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified
> in the order in connection with the agreement or any related agreement;
> (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
> (d) direct the return to a surety of any property provided by him for the purposes of a security;
> (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;
> (f) alter the terms of the agreement or of any related agreement;
> (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.
> …

(4) An application under subsection (2)(a) may only be made–
(a) in England and Wales, to the county court;"

19. The point to note about S.s140A&B is that both are very broad. So, the determination of what makes an unfair relationship (UR) encompasses all the circumstances, and therefore covers the documents, the Defendants' conduct, the brokers' or dealers' conduct and each Claimant's circumstances. Furthermore, the choice of redress the County Court will provide if the claim is successful is also very wide. It is not a common law damages claim based on duty, breach, causation and loss alone.

20. **CONC Guidance on the conduct of lenders and brokers**
Before I set out the relevant paragraphs of CONC (the post 2021 version) from the copy in the authorities bundle, I should explain that below the word "firm" includes, as the context requires, "an authorised person", which includes both lenders and brokers.

"**CONC 14.1 Application**
CONC 14.1.1R01/04/2014RP
This chapter applies to a firm with respect to a credit-related regulated activity.
Requirements
CONC 14.1.2R01/04/2014RP
A firm must not appoint an individual, who is not an authorised person or an exempt person, to act as an agent of the firm, in carrying on regulated activities of the firm unless all of the following conditions are met at the date of the individual's appointment and while the individual continues to act as the firm's agent:
(1) the firm appoints the individual as the firm's agent;
(2) the individual works as agent only for the firm and not as agent for any other principal;
(3) the firm has a written contract with the individual which:
(a) sets out effective measures for the firm to control the individual's activities when acting on its behalf in the course of its business; and
(b) requires the individual to make clear to customers that the individual is representing the firm as the individual's principal and the name of the firm;
(4) (in the case of collecting debts) receipt of repayments by the individual is treated as receipt by the firm; and
(5) the firm accepts full responsibility for the conduct of the individual when the individual is acting on the firm's behalf in the course of the firm's business."
…
"**1.2.2 R** A firm must:
(1) ensure that its employees and agents comply with CONC; and
(2) take reasonable steps to ensure that other persons acting on its

behalf comply with CONC."

…

"CONC 3.3 The clear fair and not misleading rule and general requirements

3.3.1 R

(1) A firm must ensure that a communication or a financial promotion is clear, fair, and not misleading."

…

"Credit brokers' status

3.7.3 R

A firm must, in a financial promotion or a document which is intended for individuals which relates to its credit broking, indicate the extent of its powers and in particular whether it works exclusively with one or more lenders or works independently."

…

"Commissions: credit brokers

4.5.3R

A credit broker must prominently disclose to a customer in good time before a credit agreement or a consumer hire agreement is entered into, the existence and nature of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party, where the existence or amount of the commission, fee or other remuneration could actually or potentially:

(1) affect the impartiality of the credit broker in recommending the credit agreement or the consumer hire agreement; or

(2) if made known to the customer, have a material impact on the customer's transactional decision to enter into the credit agreement or the consumer hire agreement."

4.5.4.R At the request of the customer, a credit broker must disclose to the customer, in good time before a regulated credit agreement or a regulated consumer hire agreement is entered into, the amount (or if the precise amount is not known, the likely amount) of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party."

…

"Prohibition

4.5.6 R

A lender or credit broker must not:

1. (1) enter into or have rights or obligations under a discretionary commission arrangement; or
2. (2) seek to exercise, enforce or rely on rights or obligations under a discretionary commission arrangement, including any rights or obligations to receive or tender."

The test for joinder/severance

21. The test to be applied in an omnibus claim form case was recently considered in *Morris & ors v Williams & Co Solicitors* [2024] EWCA Civ. 376. The Master of the Rolls, Lewison and Falk LJJ. were considering a case in which 134 investors had sued a solicitors firm which had been nominated by developers to advise investors on investing in their development projects. The claimants issued one claim form alleging bad advice and claiming damages. The Defendant applied to strike out for breach of r.7.3 and the judge dismissed the application. On appeal the judge was upheld. The test under r.7.3 was held to be to use and apply the normal meaning of the words in the rule. There was no exclusionary rule based on the old Rules of the Supreme Court, Order 15, r.4, or that required the Claimant to prove that the claims had common issues of sufficient significance so that their determination would involve real progress or would bind all the parties. Such matters were held to be relevant but not exclusionary. Guidance was given that steps should be taken to ensure that defendants are not disadvantaged by inadequate pleading and should be entitled to know the cases they have to meet. Vos LJ, the Master of the Rolls, gave the judgment. He first considered Group Litigation Orders and how they related to common issues of fact or law. Then he considered the Divisional Court's decision in *Abbott v Ministry of Defence* [2023] 1 WLR 4002 (*Abbott*). He agreed with some parts of Andrew Baker J. and Dingemans LJ's analysis of r.7.3 in general but overruled their decision to the extent that the Divisional Court put forwards the following tests as exclusionary tests relating to identified common issues and trying lead claims on such issues: (1) the "real progress" test or (2) the "real significance" test or (3) the "must bind" test in relation to the following cases and parties in the joinder group. None of these are rules of exclusion. He then came to the correct test in r.7.3 and ruled thus:

> "48 … The question is rather: in what circumstances can multiple claims be conveniently disposed of in the same proceedings? It seems to have been common ground at the end of the hearing that the answer to that question included the circumstances described in O15 r 4. I entirely agree with that proposition for several reasons. First, it is obviously the case that claims can be conveniently disposed of in the same proceedings if common questions of law or fact arise in all the claims brought and if the claims are in respect of or arise out of the same transaction or series of transactions. Secondly, nobody ever suggested when the CPR was introduced that a radical departure was intended from the previous position as to group actions, save for the introduction of GLOs. Thirdly, the concept of "convenience" appeared many years ago in Ord 15 r4 where it was provided that if two or more plaintiffs were parties and the court thought that their joinder might embarrass or delay the trial or was otherwise inconvenient, separate trials could be ordered. It is this rule that seems to have been used as a foundation for the simplified words in 7.3. The intention of the CPR was to make the procedural rules intelligible to non-lawyers as well as lawyers. Finally, for the reasons given in the Guide, amongst others, interpreting 7.3 as excluding

> the cases brought by multiple claimants within O15 r4 would not serve the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
> 49. I turn next to the question of whether any of the three tests promulgated in *Abbott* are correct. I have described the three tests as the real progress test, the real significance test and the test that requires that the determination of common issues in a claim by multiple claimants under 19.1 would bind all parties. I do not think any of these tests is appropriate to exclude cases from the ambit of 19.1. It seems to me that 19.1 and 7.3 must be construed as meaning what they say: any number of claimants or defendants may be joined as parties to proceedings, and claimants may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings. There is no exclusionary rule of real progress, real significance or otherwise. The court will determine what is convenient according to the facts of every case."
> …
> "51. I accept that multiple claims will probably be capable of being conveniently disposed of in the same proceedings where common issues will bind all or most of the claimants (see paras 31, 33 and 35 above), but I do not think that is currently a requirement of the CPR. Nor, therefore, is it the correct test. There is no test beyond the words of rule 7.3, even if it is clear that cases within the old O15 r 4 and cases where common issues will bind all the claimants will obviously be capable of being conveniently disposed of in the same proceedings."

I have not ignored para. 50. I shall return to it below. This decision provides the current governing guidance to lower Courts on how to approach applying CPR rs. 7.3 and 19.1 in omnibus claims. The guidance is not the same as that given in *Abbott* for the reasons stated. The test for severance of omnibus claims does not have the so called exclusionary factors as set out in *Abbott,* they are merely some of the many factors which a Court is required to consider when determining what convenient disposal entails.

Methods of case managing multiple similar claims

22. There are various procedural methods of pursuing multiple similar claims against the same Defendant which are enfranchised by the CPR.

23. **Route one, separate claim forms:** the claims may be issued separately and then tried separately. Alternatively, all or some may, after separate issuing, be consolidated or case managed together. Alternatively, some or all may be made subject to a Group Litigation Order (GLO) under CPR r.19.21-19.23 and PD19B. At the latest they may be conjoined or heard together on appeal.

24. **Route two, omnibus claim form:** the claims may be issued together in an omnibus claim form under CPR r.7.3 and 19.1 and then managed together. Preliminary issues, or test or lead cases may, or may not, be identified and tried to determine common issues. They may be split apart to determine preliminary liability issues in batches or later to determine individual quantum or remedies. The omnibus claim form route is flexible and does not depend on the GLO criteria. The process is still developing. The Law Society has a multiparty information service. I have not been informed whether any major court centre has an omnibus claims protocol discussed with Court user groups.

The objective

25. Whichever route is taken the objectives are the same. The Court seeks to fulfil the overriding objective set out in CPR r.1 and the requirements in CPR r.1.1, to deal with cases justly and at proportionate cost; seeking to ensure equal footing, full participation, saving expense, proportionality to the sums involved; taking into account the complexity and the importance of the case and the financial positions of the parties; whilst allocating an appropriate share of the Court's resources and enforcing compliance with the rules.

26. Case management under either route may lead to similar end results. Preliminary issues may be listed for hearing or test or lead claims may be identified and tried so that common issues of law or fact are determined in a proportionate way. The results may bind the parties in the following claims or may merely be persuasive. Along the way, case management hearings are used to determine how and when the pleadings, witness statements, expert evidence and disclosure are to be managed; when and how to identify the common issues and if, when and how to choose test/lead cases which will go forwards, ahead of the other cases, to determine the common issues, if that is appropriate, and whether decisions will be binding on following cases. Underlying all of this process is the objective of enfranchising the parties to settle valid cases if they can do so.

Heads up on my conclusion

27. In these claims the Claimants chose route two. The Defendants assert that they should have chosen route one. The Judge applied the guidance from the Divisional Court decision in *Abbott,* which bound him, and which the Court of Appeal has ruled subsequently was not the right test. For the reasons set out below I consider that inter alia, because the Judge applied the wrong test, the appeal must be allowed.

Wider context

28. These claims are set in a wider context. There are many cases progressing through the Courts concerning undisclosed PPI brokers' commissions, energy company brokers' commissions and car finance brokers/dealers' commissions. The Supreme Court is currently hearing the appeal in *Johnson, Wrench, Hopcraft v FirstRand Bank and Close Brothers* from the decision of the Court of Appeal reported at [2024] EWCA Civ. 1282,

(*Johnson*). In those claims three individual actions were started in the County Courts relating to car finance agreements in which the claimants asserted (1) secret commissions and/or DCs and (2) breach of fiduciary duty to advise properly by the car dealers for which the lenders were liable and (3) breach of the duty to be financially disinterested personally in the choice of product to recommend as suitable for the consumer. In the Court of Appeal only *Johnson* involved and appeal relating to S.140A of the CCA. The claimants were unsophisticated in relation to finance. One claimant was not told of any commission. The other two were not told either but the standard terms of their credit agreements referred to the fact that a commission "may be payable" and in *Johnson* a leaflet set out that a commission "may be payable". They asserted the dealers had a duty to be financially disinterested in the choice of loan which meant the dealers had to disclose any commission and could not keep it secret and the lenders were liable for the dealers' breaches (the agency point). For the claimants whose documents indicated that a commission may be payable they asserted that partial disclosure was insufficient and was a breach of the duty to disclose and so they did not give fully informed consent to the loan. The cases were determined differently at trial by different District Judges (deputies actually). *Wrench* and *Johnson* appealed to Circuit Judges, then appealed to the Court of Appeal and then to the Supreme Court. *Hopcraft* leapfrog appealed to the Supreme Court. In the Court of Appeal, Andrews LJ. set out the general background to what she called "side arrangements" between lenders and dealers/brokers about commission. In *Hopcraft* the credit agreement was made in 2014, in *Wrench* it was made in 2015 and in *Johnson* it was made in 2017. So, the time taken to resolve those claims finally is 10 years for *Hopcraft* but less for the others. The cases were conjoined for the appeals in the Court of Appeal. The Court decided as follows:

> "18. For the reasons set out in this judgment, we allow all three appeals. The dealers were the sellers of the cars, but they were also acting as credit brokers on behalf of the claimants. In the latter role, their task was to search for and offer the customer a finance deal from their panel of lenders which was suitable for their needs and competitive. In some cases they undertook to find the best deal or the one which was most suitable for the customer. They therefore owed the claimants the "disinterested duty" described in *Wood.* The relationship was also a fiduciary one. In all three cases there was a conflict of interest and no informed consent by the consumer to the receipt of the commission. However, that would be insufficient in itself to make the lender a primary wrongdoer. In order to give rise to a primary liability on the part of the lender, the commission must be secret. If there is partial disclosure which suffices to negate secrecy, there is binding authority (*Hurstanger*) that the lender can only be held liable in equity as an accessory to the broker's breach of fiduciary duty.
>
> 19. On the facts, there was no disclosure in *Hopcraft* and, we find, insufficient disclosure in *Wrench* to negate secrecy. The payment of the commission in those cases was secret, and the lenders were therefore liable

> as primary wrongdoers. In the light of the concession which was made below, we must treat the situation in *Johnson* as similar to that in *Hurstanger,* where there was sufficient disclosure to negate secrecy, but insufficient disclosure to procure the consumer's fully informed consent to the payment. We find that the lenders in *Johnson* are liable as accessories for procuring the brokers' breach of fiduciary duty by making the commission payment to them in the circumstances in which they did.
> 20. So far as the statutory claim is concerned, the mere fact that there has been no disclosure of the commission, or only partial disclosure, will not necessarily suffice to make the relationship between lender and consumer "unfair" for the purposes of the 1974 Act. However on its specific facts, Mr *Johnson's* claim under the 1974 Act succeeds."

I will set out a few more paragraphs below because I consider that they are important when I come to consider the omnibus claim form decision. Andrews LJ. determined that the lender was liable to *Johnson* despite the fact that there was no full consideration of all the circumstances required under S.140A and explained why thus:

> "166. In fact, the reality was that the Trade Centre Wales made no attempt to be impartial between different lenders in the interests of the consumer. All the business was offered to FirstRand. The dealer gave the customer the Suitability Document which actively concealed the reality. The dealer offered no service to Mr *Johnson* as a broker at all except to introduce him to one lender to whom it was tied by Clause 2.1 of the Dealer Terms of Business and from whom it took a lavish commission. The existence of the relationship between lender and dealer in this case was such as to require honest and accurate disclosure so that the customer could decide whether he wanted to buy a car with finance obtained through a dealer/credit broker who would conduct at least some review of what the credit market, or a panel of lenders within it, might offer him.
> 167. We therefore agree with HH Judge Jarman KC that the way in which the DDJ dealt with the claim under section 140A was inadequate. However, we do not agree that the case should be remitted to the County Court. The judge's concern was that the trial judge had made no finding on the important question of what disclosure had been made to *Mr Johnson* about the commission arrangements. He did not remit that issue only, because he rightly held that the issue of fairness under the 1974 Act is to be considered in the light of all relevant matters, see section 140A(2).
> 168. On the evidence there is only one possible finding on the issue of disclosure, and that is that the commission was not disclosed. *Mr Johnson's* evidence is that the payment of commission was not disclosed to him orally, and that he was not aware of it because he did not read the Suitability Document or the lender's Terms and Conditions. No evidence to the contrary was adduced. Any finding that *Mr Johnson* was actually aware of

> the commission arrangements would be unsustainable on the evidence. This conclusion is reinforced by the fact that he was dealing with a dealer who had supplied the false Suitability Document. Why, having done that, would the dealer then volunteer the truth?
>
> 169. We consider that HH Judge Jarman KC was in a position to make a determination as to whether Mr *Johnson* is entitled to protection under section 140A of the 1974 Act, as are we. We are quite satisfied that the relationship between the lender and Mr Johnson arising out of the agreement was unfair to Mr Johnson because of things done (or not done) by, or on behalf of, the lender, FirstRand (either before or after the making of the agreement or any related agreement). Fairness in this context is a matter of degree, and the fact that the commission to the broker was 25% of the sum advanced is a key fact, as is the fact that the sum borrowed and paid to the dealer was much more than the car was worth. The fact that this very bad bargain arose from a relationship between the broker and the lender which was falsified by the broker, and not disclosed by the lender, is also critical.
>
> 170. A relationship will not necessarily be unfair for the purposes of the 1974 Act simply because a broker receives a commission from the lender and the borrower is not actually aware of that fact. The court is required to consider all the facts and to weigh their importance. If the commission is very high in relation to the sum borrowed that may, in itself, be enough to make the relationship unfair where nothing, or nothing of substance, has been done to disclose the relationship between the lender and the broker. It is not necessary to develop this analysis further for the purposes of the appeal in Johnson because the commission was very high in that case, and the true nature of the relationship between the lender and the broker was not disclosed by the lender and actively concealed by the broker (acting as agent for the lender by virtue of section 56 of the 1974 Act). It is a very clear case." (My italics for the names of the claimants).

29. I shall call this the "*very clear case*" point. The Court of Appeal considered that the appellate Judge could have and should have decided the relationship was unfair under S.140A on the facts found by the DDJ. Fairness is a matter of degree. A huge and obviously unfair commission in relation to the sum borrowed which is kept secret and undisclosed to the consumer may in itself be sufficient to satisfy the unfair relationship test.

30. There are two Supreme Court cases giving guidance on S.s140A&B, which were relied upon by the Respondents to submit that the determination in lead cases of common issues relating to whether non-disclosure was a breach of CONC would not be determinative or helpful to the following claims. Neither related to omnibus claim forms. In *Plevin v Paragon Personal Finance Ltd and another* [2014] UKSC 61 (*Plevin),* Mrs Plevin sued the broker and lender and settled the claim against the broker. She had bought PPI insurance to cover her repayments under a consumer credit

agreement. Over 71% of the premium charged was undisclosed commission paid to the broker and the lender. She lost before the recorder. The lender *had not broken* the relevant regulatory code and the broker was not the lender's agent so the lender was not liable for the broker's defaults. The recorder was bound by the Court of Appeal decision in *Harrison v Black Horse Ltd* [2012] Lloyd's Rep IR 521 (87% undisclosed commission, no rules breach so no liability). On appeal the Court of Appeal transferred the case back for determination of her S.s140A&B unfair relationship claim based on the lender potentially being liable for the broker's actions in failing to disclose the commission (a quasi-agency point) despite the lender not itself breaching any regulatory rules. The Supreme Court dismissed the lender's appeal. *Harrison* was overruled. Lord Sumption JSC ruled at para. 17 that the regulatory rules imposed a minimum standard whereas S.s140A&B were far wider encompassing a wide range of factors, so the lack of rules breach by the lender was not determinative of the unfair relationship issue. Having found the relationship to have been unfair, the case was therefore remitted back to the County Court to decide what, if any remedy to award Mrs Plevin.

31. S.s 140A&B of the CCA were revisited in *Smith v Royal Bank of Scotland plc Burrell v Royal Bank of Scotland plc* [2023] UKSC (*Smith*). Two claimants separately sued their lender under the CCA alleging unfair relationship for undisclosed commissions paid to the bank by the PPI insurers under payment protection policies taken out with the original credit agreements. Limitation was raised and the claimants lost at first instance and on appeal but won in the Supreme Court. The ratio concerned limitation but Lord Leggatt described the broad nature of the S.140A assessment of unfairness thus:

> "22 A third point which is apparent on the face of the provisions is the breadth and open-ended nature of the assessment required by section 140A. The court is not left entirely at large, as subsection (1) requires the court to decide whether the relationship is unfair to the debtor because of one or more of three specified matters. These three possible causes of unfairness are, however, extremely broad. They include not only (a) "any of the terms of the [credit] agreement or of any related agreement" and (b) "the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement", but also (c) "any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement)". It would be hard to cast the possible causes of unfairness more broadly than this. What is more, subsection (2) makes it clear that there is no restriction on the matters to which the court may have regard in deciding whether the relationship is unfair to the debtor, provided only that the court thinks them relevant. Subsection (2) also makes it clear that, if any matter is thought relevant, the court not only can but must have regard to it. The breadth of the matters that may be thought relevant is illustrated by a list of examples given by *Hamblen J in Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) at [346]."

> …
> "25 Fifth, as well as requiring the court to make a very broad and holistic assessment to decide whether the relationship between the creditor and the debtor is unfair to the debtor, the legislation also gives the court, where a determination of unfairness is made, the broadest possible remedial discretion in deciding what order, if any, to make under section 140B. Section 140B gives the court an extensive menu of options from which to select but says nothing at all about how this selection may or should be made. On the face of the legislation the court's discretion is entirely unfettered. It is, I think, clear that the court is not in these circumstances required to engage in the kind of strict analysis of causation, loss and so forth that would be required, for example, in deciding what remedy to award in a claim founded on the law of contract or tort. Some constraint is, however, imposed by consideration of the general purpose of an order under section 140B. In principle, the purpose must be to remove the cause(s) of the unfairness which the court has identified, if they are still continuing, and to reverse any damaging financial consequences to the debtor of that unfairness, so that the relationship as a whole can no longer be regarded as unfair."

32. The third such case was the Court of Appeal decision in *Self v Santander Cards UK Ltd Harrop v Skipton Building Society* [2024] EWCA Civ. 1106 (*Self*). Two claimants made complaints about non-disclosure of commission paid because of PPI policies taken out alongside consumer credit agreements. Under the regulatory rules redress was paid to them because the undisclosed commission was 50% of the premiums. They accepted the redress but later made claims under S.140A of the CCA. The defendants pleaded that the claims had been settled by the redress agreements. The claims were dismissed. The Court of Appeal dismissed the appeals but Stuart-Smith LJ said this about unfairness and remedies under S.140A:

> "56 It follows that application of sections 140A and 140B is bound to be fact-sensitive: even in a world of widespread mis-selling and unfairness, this is not a jurisdiction where, on its proper analysis and application, a single pre-determined criterion will always determine the question of unfairness; nor will one size of remedy fit all cases where the relationship is found to be unfair. It is easy to conceive of cases where allowing a full refund of all premiums (including commissions and profit share) together with interest would be to do more than was required to remedy the causes of the identified unfairness. It is equally easy to conceive of cases where anything short of a full refund will fail to remedy them. That is why the Supreme Court in *Plevin* while being clear that the commissions paid in that case were a long way beyond the tipping point, were equally clear that the case had to be remitted to the County Court to decide what if any relief under section 140B should be ordered unless that could be agreed."

So, the broad nature of the S.s140A&B decisions was reaffirmed and the *tipping point* (or what I have called the *very clear case*) issue in relation to S.140A was also confirmed.

Relevant factors

33. I take from the ruling in *Morris* that the decision in *Abbott* was too restrictive; the test in CPR r.7.3 is broader and follows the words therein. There is no knock-out test relating to the GLO requirements, no exclusionary requirement for common significant issues, or for binding decisions in lead cases or whether decisions in lead cases will produce real progress for following cases. Those are all relevant factors alongside others. The nine factors identified in *Morris* and the other case law relevant to the decision to choose between allowing multiple claims to go forwards at the start in an omnibus claim form, or requiring separate claim forms, appear to me to be as follows:

(i) Whether there are multiple claimants suing the same defendant or multiple defendants.
(ii) The number of claimants.
(iii) Whether the claims relate to the same matters or different matters (see *Adams* cited below).
(iv) Whether the claims involve the same causes of action.
(v) Whether the issues as set out in the generic POC are likely to be common issues.
(vi) Whether the case specific claims and defences do or are likely to raise common issues of law or fact.
(vii) Whether decisions in lead or test cases will be significant for the disposal of following cases so that they will either bind the parties (issue estoppel) or be persuasive in the disposal of issues in the following cases (for example breach of regulatory guidance, agency liability, fiduciary duty, disinterested duty, interpretation of brokerage agreements, the very clear case point, or more generally: breach of duty, breach, liability, causation or quantum).
(viii) Whether the overriding objective is better met by route one or route two, taking into account the requirement to deal with cases justly and at proportionate cost; seeking to ensure equal footing, full participation, saving expense, proportionality to the sums involved, the complexity and the importance of the case and the financial positions of the parties; whilst allocating an appropriate share of the Court's resources and enforcing compliance with the rules.
(ix) Overall, whether all or some of the claims will more conveniently be disposed of together.

Guidance from the first instance case law

34. To gain an understanding of the approach taken in other cases to the two routes I have described above in cases based on Ss.140A&B of the CCA I set out below the case law referred to by the parties in their skeletons and submissions. I remind myself that care must be taken here. Cases on GLOs are not the same as cases on omnibus claim forms. GLOs have stricter criteria set out in CPR rs. 19.21 and 19.22, and thereafter a

discretion for the judge to apply, whereas the test for rs. 7.3 and 19.1 is not the same, the discretion is wider. The first few cases below were pre-*Morris,* whereas *Abernethy, Adams*, *Johnson,* and *Breeze* were post *Morris.*

35. In *Tew & ors v BoS & ors* [2010] EWHC 203 (*Tew)*, Mann J. was case managing multiple claims about a particular type of mortgage lending. Over 100 separate actions had been started. This was not an omnibus claim form case. The claims were made under the *Unfair Terms in Consumer Contracts Regulations 1994* and Ss.140A&B of the CCA. The Master had made a GLO to determine various central common issues. The defendants appealed and opposed the GLO and the claimants sought to redefine the common issues. The issue was how the actions should progress. The claimants had sought the GLO for the common issues relating to the financial effects on the claimants and "in principle" unfairness but excluding evidence relating to their personal circumstances or financial sophistication. The defendants argued that all claims would have to be separated later and determined, so a GLO was not appropriate. There were access to justice issues raised by those claimants who had low income. Mann J. considered it wrong to exclude the consideration of individual circumstances from the scope of the litigation (para. 22). He overturned the Master's order for a GLO but permitted a more limited GLO. He commented thus:

> "24. I approach this issue from two angles. First, there is the broad question of whether seeking to manage this case so as to see if it can be decided on the basis of common issues without reference to individual cases is a sensible and practical approach. The second angle is whether the formulation of the issues in Appendix 2 is itself sensible or practical. Those questions are, of course, closely related.
> 25. As to the first, I am firmly of the conclusion that as a general approach it is neither sensible nor practical. It does not reflect the likely real issues, nor does it encapsulate a sensible method of trying them. On the face of the legislation, the facts of individual cases are capable of affecting the assessment of fairness, and they cannot be disregarded as such.
> …
> 27. That leaves open Mr Lowe's alternative way of approaching matters, which is to decide unfairness without looking at personal circumstances with a view to achieving a sort of prima facie finding of unfairness and then (if necessary) feeding the individual circumstances into the mix at that stage (see for example paragraph 8 in Appendix 2). That does not seem to me to be a proper or sensible way of going about the litigation. The inquiry as to fairness is a one stage inquiry looking at both sides of the transaction, not a two stage inquiry. That is plain enough from the statute, and the sensible conduct of this litigation requires it.
> …
> 29. There is one further factor which I have in mind. Even if it might be appropriate to try to get a determination of fairness, whether prima facie or

> not, without putting that question in a real factual transactional context, I have to consider the degree of likelihood of that turning out to be possible. It would be a positive disadvantage to this litigation to go through the exercise, make some findings of fact but to decide that the question of fairness cannot, after all, be decided at that stage."

Having rejected the claimants' approach Mann J. allowed a narrow issue GLO (paras. 10, 33 and 37) relating to one regulatory breach thus:

> "10. … Whether or not this regulation excludes the fairness assessment exercise is going to be an issue.
>
> …
>
> 34. As to that, it seems to me that there is one plain common issue, which probably needs to be got out of the way before one embarks on fairness questions, at least under the 1994 Regulations. That is the questions raised by Regulation 3. They apply across the board. If the banks succeed on it there will (as I understand it) be no further question of fairness to be decided under the 1994 Regulations. If they fail, questions of fairness arise under those Regulations, and they arise in any event under the 1974 Act. Fairness questions can best be tackled by taking lead cases, or test cases (depending on one's preferred terminology). Sample cases can be taken which represent various parts of the spectrum. Technically speaking, the actual findings of unfairness in those cases will not bind other litigants, whether under a GLO or not, but they will doubtless provide guidance for the disposition of a lot, if not all, the other cases. Insofar as they do not lead to agreement on all outstanding cases, then any remaining cases can be dealt with more efficiently by virtue of the material which has already been rehearsed and ruled on in the lead cases."

Mirroring this approach, the Claimants at the CMC narrowed the common issue down to just one matter. I bear in mind that the appeal before me is about an earlier filter than a GLO, it is about r.7.3. I bear in mind that a different test is applied in GLO cases.

36. In *SAM borrowers v BOS* [2015] EWHC 209, Joanna Smith J. was sitting as a county court judge, hearing costs matters in 161 claims issued under an omnibus claim form. They related to claims under S.s140A&B for unfair relationships arising from mortgages provided to borrowers. The costs budgets were in the millions. The relevant paragraph in the judgment (28) set out that the parties intended to identify lead cases and although that process might increase the case management costs it would lead to fewer trials and the likelihood of settlement of all the following claims.

37. *Moon & ors v Link Fund* [2022] EWHC 3344 (*Moon)*, did not involve S.s140A&B of the CCA or the broad tests for unfair relationships and remedies therein. Trower J. was determining a GLO application. One firm of solicitors issued an omnibus claim form

for 100 claimants, so did another firm. Thousands of further claims were to be added. The Defendant had issued an investment fund with a prospectus. The generic POC alleged the fund invested in the wrong investments and was closed down due to bad performance and claimed damages for losses under S.138D of the *Financial Services and Markets Act 2000* for, inter alia, breaches of the applicable regulatory rules. The parties agreed that there were common issues of fact or law concerning the mismanagement allegations, regulatory breaches and whether these caused loss. At para. 43 Trower J. stated that the precise issues did not have to be defined at that stage, those would evolve as the claims progressed, however, the important point was to identify, in broad term, the common issues. He granted a GLO for determination of the alleged defendant misconduct issues. I take from this decision that, if the precise issues do not need to be identified at the start of a GLO, the test for which is far more prescribed than for issuing and managing an omnibus claim form, then it would not make sense for the Courts to require precise common issues to be identified so early, before pleadings, in r.7.3 or omnibus claims. What is needed at this early stage is to identify the broad common issues and to think about likely more precise issues which may arise, or better, to put the decision off until the issues are clearer.

38. In *Adams & ors v MoD* [2024] EWHC 1966 (*Adams)*, one firm of lawyers issued omnibus claim forms for multiple claimants for 3 types of personal injury claim: noise induced hearing loss; coldness injuries and post-traumatic stress disorder. There were 3 different defendants: the Army, the RAF and the Navy. Despite the huge disparity in the types of claims, generic issues were agreed by the parties (by working together) and an order was made for trial of lead cases. By the time of the CMC in April 2024 many cases had settled on liability (which is more likely if the parties work together) and only quantum remained to be individually determined. The joinder of so many cases on one claim form had created administrative difficulties for the Courts which were set out in the judgment. CEFile issues were explained. The aggregated CEFile was being disaggregated because individual case file numbers had been given to each claim to make finding, reading in and filing easier. Garnham J. and Master Davison together considered whether to sever the claims under CPR r.7.3. At paras. 12-18 Garnham J. summarised the principles he elicited from *Morris.* Both parties opposed severance. He noted that he might not have approved an omnibus claim form but the inconvenience created for the Courts' CEFile had been solved. However, the decision was made not to require the claimants to issue new claim forms. In a post-script Garnham J. commented that, in claims where individual determination will be required at the end, the usefulness of omnibus claim forms may be short lived.

39. In *Kerrigan & ors v Elevate Credit (t/a Sunny)* [2020] EWHC 2169 (Comm) (*Sunny)* HHJ Worster (the Judge in the appeal before me) was determining preliminary common issues arising from payday, high interest rate, loans. The actions were brought under an omnibus claim form and had two causes, one of which was Ss. 140A&B. Breach of CONC was central. 12 lead claims were chosen to try the common issues. He determined that the lender broke the CONC rules. He decided causation of loss on the

evidence. On whether that was enough for a ruling that the relationship was unfair under Ss. 140A&B he commented thus:

> "[190] The court is not bound to adopt the line drawn by the FCA in its drafting of CONC in this sort of case, but where the rules take account of the need to balance relevant matters of policy, at the lowest it provides a starting point for the consideration of fairness, and at the highest it is a powerful factor in deciding whether the individual relationship is fair or not. Given the burden of proof, when the rules are breached in a substantive way, it is likely to be difficult for the Defendant to show that the relationship was fair."

I respectfully agree but would alter this phrase somewhat as follows: "In relation to S.s 140A of the CCA, given the burden of proof is on the lender when a judge finds that the CONC rules have been breached in a substantive way and the lender is responsible or liable for that breach, it is likely to be a more difficult task for the lender to show that the relationship was fair."

40. In *Breeze & ors v TSB Bank* [2024] EWHC 2427, Nicholas Thompsell (sitting as a Deputy High Court Judge) was determining previously identified preliminary issues arising from claims concerning mortgages sold by the Defendant to 392 claimants. An omnibus claim form had been used. The causes of action covered damages for breach of contract and remedies under S.s 140A&B of the CCA. Having determined the contractual issues he gave judgment on the S.s 140A&B preliminary issues. These concerned the scope of Ss. 140A&B. It is inherent in the fact that these preliminary issues were identified and tried that all parties knew that if the CCA Ss.140A&B applied a further set of trials would be needed to determine UR.

41. In *Abernethy & ors v Barclays & ors* [2025] EWCC 1 (*Abernethy*), HHJ Kelly was case managing 3,420 payment protection insurance (PPI) claims, involving commissions funded by the buyers' premiums, started in an omnibus claim form by one firm of solicitors against 8 defendants. Generic POC were served alleging, inter alia, unfair relationships (URs) under Ss.140A&B of the CCA. They relied on breach of the FCA Handbook (CONC). The claimants then made a GLO application setting out the many common issues they identified and seeking a register of claimants to be bound, around 20 test cases to be selected and a 4 week trial of the common issues. In the alternative they sought collective case management for identifying issues and test cases. The Defendants opposed the GLO or any collective case management and sought a r.7.3 severance order. Lots of evidence was served. Having summarised the CPR on GLOs, HHJ Kelly, at para. 29, distinguished the common issues of fact or law for the GLO from the final determination of the claims which would involve determination of all the issues. She addressed whether the following issues could be common: (1) unfairness issues and (2) the size of the undisclosed commission as a percentage of the premiums paid and whether there was a tipping point at which the commission was so

large that it was obviously unfair. She took into account the Supreme Court guidance in *Plevin* (at paras. 17-18) which stressed the multi-factor nature of the unfair relationship test in S.140A of the CCA, but also recognised that a tipping point may come when the commission is so large that the relationship would be unfair (in Mrs Plevin's case the 71.8% commission was such because it was so large). In *Plevin* the remedy decision was remitted to the County Court. HHJ Kelly rejected the submission that relationship fairness could be determined as a common issue because it was multi-factor based. She also rejected the asserted tipping point common issue because it shut out the Claimant's own circumstances which were part of the multiple factors in S.140A claims. She accepted that 6 other common issues existed. She considered the discretion in GLO cases as to whether to grant the order. She set out 8 factors to consider at para. 89. These were: (1) the volume of claims and impact on the courts. (2) The extent to which test cases would produce binding decisions and/or guidance, and the implications for the determination of non-test case claims. (3) Timeliness of the disposal of claims. (4) Comparative costs. (5) Access to justice. (6) Adequacy of claimant funding. (7) The suitability of the lead claimant solicitors. (8) The views of non-parties. She recorded at para. 96 that:

> "the courts are however used to dealing with high volumes of *Plevin* claims. Around 56,000 claims were issued between October 2020 and March 2022. There is a degree of consensus between the parties that historically only around 8% of *Plevin* claims require a final hearing. Virtually all of these claims are on the small claims track."

HHJ Kelly then decided that Mann J.'s approach, to grant a limited GLO in *Tew,* would not be appropriate. At paras. 104-105 she set out the reasons why. These included: the limited scope of the common issues; the fact that fairness would not be one of them (because she had decided it was not); the advancement of litigation since 2010 and the way the *Plevin* cases were run; the decisions already made in *Smith* and *Self* (cited above); the fact specific nature of fairness determinations; the fact that claimants had failed to show why a limited number of test cases would bind other cases or give clear guidance to assist resolution. She also considered the disposal times of individual *Plevin* cases, which was between 195 and 291 days, depending on the year and reducing more recently, whereas a GLO would make them take longer. Evidence was provided of comparative costs. She was unconvinced that a GLO would provide huge savings but could decide little more. HHJ Kelly considered access to justice and the uneconomic nature of small claims for claimant firms. She was given evidence on funding. She was not prepared to accept what might have looked like moral blackmail were there was a threat that the claimants' solicitors would not pursue small claims under a certain sum unless there was a GLO. She exercised her discretion to refuse a GLO. She then considered collective case management under the omnibus claim form model but the claimants' proposals had not been thought through and were really the same as a GLO. She refused the omnibus route and ordered severance (see paras. 155-158). This was explained as being done because there were 8 different defendants; it

was unclear from the generic POC and little was known about the issues which arose in each claim and the claimants had not grouped similar claims together (say by type of PPI product).

The judgment

42. The Judge explained his reasoning in a 17 page judgment. He decided that the Claimants should have chosen route one, namely to issue separate claims for all the cases instead of route two, omnibus claim forms. He expressly relied on the judgment of the Divisional Court in *Abbott* and the guidance given therein, by which he was bound. I consider this to be so (despite the Respondents submitting the opposite) because of the following matters. The Judge delayed finalising his judgment, after the draft judgment was sent out, because he was asked to read submissions on the effect of the judgment in *Abbott* (para. 7). He expressly changed the nature of the issues he had to decide because of *Abbott* (para. 9). He said the degree of commonality took on more significance after *Abbott* (para. 23). He changed his approach after *Abbott* and expressly applied the approach in *Abbott* (para. 28). He said that the nature of the test he was applying was different after *Abbott* (para. 28). He set out the *Abbott* tests at paras. 31 (2-6) which the Court of Appeal approved in *Morris*, but he also set out the tests from *Abbott* which he applied, but which the Court of Appeal overruled, see paras. 31 (8, 9, 10, 11, 12, 13). In *Morris* at para. 49, the Court of Appeal rejected the tests paraphrased as: the real significance to following cases, the real progress for following cases and the bindingness on following cases tests. These were merely factors.

43. The Judge ruled thus:

> "44. The central question is whether there are significant common issues, the determination of which would amount to real progress towards the final determination of each claim in a set of claims. I agree with Mr Clark, that it is not the number of issues which matter, but their significance and commonality. Having considered the issues argued before me on 5 May 2023 and supplemented in writing, I am not satisfied that there are … *common issues of sufficient significance that their determination would constitute real progress towards the final determination of each claim in a set of claims…* . In those circumstances, I am not satisfied that the, convenience test provided for by CPR 7.3 and explained in *Abbott,* has been met. That is the same decision I came to in the first draft of this judgment, but one which is reached by a different route," (my italics).

44. At paras. 44 and 55 the Judge decided to sever the claims. His reasons were as follows.
    (i) At para. 44 the Judge decided that the *Abbott* convenience test in r.7.3 was not satisfied.
    (ii) In paras. 44 and 51, the Judge decided that the common issues raised by the Claimants were not sufficiently significant or common.

(iii) In para. 52, the Judge decided that if the cases remained joined the process of identifying lead cases would be unlikely to save time or costs. Partly because of (1) the limited effect of the decisions in lead cases; (2) the complexity of choosing lead cases; (3) his view that continuing joinder would be unlikely to achieve more than separate claims would achieve.

(iv) In paras. 39 and 42 the Judge decided that, if the claims remained joined, even if the Court made a ruling that the decisions on the two big common issues were to be binding on all other parties, those would have limited effect because: (a) they would only be in principle, and (b) S.140A CCA claims are fact specific (para. 39) and the range of relevant facts is wider than just breach of the OFT or the CONC guidance on DCs.

(v) At para. 53 the Judge decided that severing the claims and then separately choosing some claims to be determined on the fast track earlier than others would be sufficient.

(vi) At para. 50 the Judge recognised that allocating some test cases to the multi-track, to explore the issues in greater depth than would occur on the small claims track or the fast track, may provide benefits.

45. The Judge also found as a fact that just before the CMC the Claimants' solicitor sent new letters of claim to the Defendants on behalf of multiple claimants some of whom overlapped with the Claimants in the current claims. These new letters of claim raised new claims for secret commission and breach of fiduciary duty. These were not causes of action which were currently pleaded in the current actions, which were limited to unfair relationship claims pursuant to the CCA. The Defendants' concern was that it appeared to be the intention for the Claimants in these actions to pursue these different causes of action against the same Defendants in respect of the same transactions, in separate actions. The Claimants' counsel asserted that the Claimants in these actions would not bring a second set of actions based on secret commission and breach of fiduciary duty after the determination of the current claims. The Judge did not determine these issues. Much was made of this in the appeal before me but I consider it to have been a red herring. If the Claimant's make an application it will be dealt with. They have not.

46. The final paragraphs of the judgment set out the Judge's thoughts on the way forwards after severance or, if he, was wrong about severance, the way forwards under omnibus claim forms. In his later judgment, dated 10.11.2023, the Judge explained that he was not satisfied that there was a sufficiently similar common issue (para. 7) and that the issues needing determination did not need a complex sampling process to identify lead cases. He gave permission to appeal because he recognised that his decision was not beyond arguably wrong. He envisaged under his ruling that the clams would be managed separately on the small claims track with some on the fast track.

The Grounds of appeal

47. **Ground 1 (G1). The wrong test and error over common significant issues.** I think that this ground can be split up into 5 parts. The Appellants submit that (1) the Judge was wrong to find that there were insufficient common significant issues, (2) the Judge used the tests expounded in *Abbott:* the real progress test, the real significance test, and the will decisions be binding test, which are the wrong tests. They submit that there were common significant issues and the correct test was set out by the Court of Appeal in *Morris*, that being wider and resting solely on the words in r.7.3. (3) In particular they assert that the Judge's decision at para. 36 was wrong because there is a common issue on *breach of CONC* by non-disclosure of DCs which involves interpretation of CONC, may be complex and will involve common issues of law and fact in each claim. (4) *Liability for breach by Agents.* Further the Appellants assert that issues over the CONC obligations on lenders to ensure that agents comply with CONC guidance (the so called anterior questions or agency issue) and the circumstances under which the brokerage agreements would make the Defendants liable for the brokers as agents were likely to be common issues. (5) *In principle unfairness.* The Appellants assert that a finding that a breach of CONC would give rise to unfairness in principle, under S.140A, would significantly affect the prospects of success in other claims.

48. **G2: the binding effect of decisions on common issues.** The Appellants submitted that because there are common issues a decision upon them in lead claims will bind all or some of the following Claimants so the claims can conveniently be disposed of in the same proceedings. Thus the Appellants assert that the Judge was wrong (in para. 42) to rule that the issues, when determined in lead cases, would not bind other Claimants.

49. **G3: the significance of decisions on common issues.** This ground was developed in submissions. The Appellants assert that the judge was wrong to hold that determinations of common issues would have limited effect on following cases. The Appellants submit that after a judge makes a ruling in one (conjoined) lead case (for instance about whether a non-disclosure of DC is a breach of CONC or goes further and determines that such is in principle unfair to the consumer), that will be persuasive and will produce useful and real progress for other Claimants and could be made binding at the case management stage. This, it was submitted, would be more useful than if some such decisions were made in random separate claims by a Deputy District Judge.

50. **G4: overriding objective.** The Appellants assert that the Judge failed to take into account the overriding objective from the point of view of expense and time. Issuing 8 claims saves the Appellants issuing fees for the other 5,815 claims and collective case management will save legal fees and Court time, potentially reducing 5,815 + 8 (5,823) CMCs to 8 CMCs. I note that the issuing fees for money claims are between £35 and £455.

The Appellant's submissions

51. **G1: Common issues.** The Appellants submitted in their skeleton that there are 5 common issues in all these cases arising from the Claimants' pleadings:

(1) Whether the pre-contact brokerage agreements between the lenders and the brokers/dealers included DC;
(2) What the scale of the DC and variable interest rates charged to the consumer via the brokers/dealers was;
(3) The level of the unfairness under S.140A of the CCA of failing to disclose the brokers' DC, so the borrower did not know of the conflict of interest.
(4) whether there were breaches of the OFT guidance or the CONC guidance in relation to the failure to disclose DCs by the brokers/dealers.
(5) Whether the lenders were liable for the brokers'/dealers' failures because they were the lenders' agents under S.56 of the CCA or otherwise.

52. The Appellants rely on the decision in *Morris.* They submit the Judge was wrong to follow *Abbott* (albeit that decision bound the Judge at the time) and that his decision revolved around the real progress test or the significant issue test or the binding nature test. They submit that since *Morris* those tests have been disavowed. They accept that, for conjoined cases, a decision in a lead case on the common issues would not necessarily bind the parties in the other claims against the same Defendant but submit that it would facilitate disposal of them because it would be authoritative and material on those common issues. The Appellants submit that the Judge was probably wrong to rule that other particular facts would more probably decide the fairness decision in S.140A instead of the common issues above. The Judge was wrong to rule that the issues of whether CONC was breached were simple, not complex. Once a judge has decided whether brokers were under a duty to inform consumers of the DC arrangements, that would apply across the board and would be unlikely to be overwhelmed or made irrelevant by the particular facts of any case. So, the Appellants assert that these common issues bring the claims within the old RSC Ord. 15. r.4 and thus within CPR r.7.3. The Appellants assert that credit agreements taken out under the same or similar terms under the same or similar brokerage agreements paying DC to the dealers/brokers come within the old definition of "a series of transactions".

53. In verbal submissions the Appellants submitted that omnibus claim forms and case management were permitted in *Sam Borrowers v BOS* [2022] Costs LR 1715 (A S.140A case); *Breeze v TSB* [2024] EWHC 2427 (involving S.140A claims and other causes of action); and *Sunny.* The Appellants raised access to justice issues but accepted that they had provided no evidence upon which to base those submissions.

54. The Appellants compared route one with route two for these claims. They submitted that separate claim forms would cost a lot more due to: issuing fees; 5,800 pleadings; disparate local case management; different low level decisions and then appeals.

55. **G2: binding effect and G3: significance.** The Appellants submit that the Judge misunderstood the decision of the Divisional Court in *Abbott* in relation to whether, with conjoined claims, a decision in the lead cases on the common issues would bind the parties in the following conjoined claims. The Appellants submit that the Judge

was wrong to find that such a decision would have limited effect on the other conjoined claims. Following *Abbott* and *Morris,* on their true basis, the Appellants submitted that parties in conjoined claims would be bound by a decision on the common issues in a lead or test case (by *stare decisis* and issue estoppel). The Judge was also wrong to decide that, with separate claims, such a decision on the common issues would have a similar effect to a decision for conjoined claims. The Appellants submitted that a binding decision would be more useful in settling cases and restricting trial issues than a persuasive decision. The Appellants also relied on *Plevin v Paragon Finance* [2014] UKSC 61, as an example where a decision in principle on unfairness relating to non-disclosure of secret commissions in PPI agreements gave rise to settlement of thousands of claims.

56. In summary, on grounds 1-3, the Appellants submitted that there were common issues, as far as they could determine them in the absence of a defence and before specific pleadings and before seeing the brokerage agreements, and that for conjoined claims a decision in test or lead claims could bind all the parties and that would be convenient to facilitate the disposal of the claims. At the least, if decisions were only persuasive, the party which lost the common issues would have to explain to the Court why in their next case the decisions were not determinative.

57. **G4:** The Appellants submitted that the greater cost (in Court fees) of bringing over 5,800 claims separately would be disproportionate and that active case management of conjoined claims would protect the Defendants properly. They also complained that they would be struck out under the Judge's order unless they issued 100 claim forms per day over 3 months including having to do all the fee remission applications.

58. **New causes of action.** At the end of the Appellants' skeleton they stated that, in the light of the decision in *Johnson,* the Claimants intend later to apply to seek permission to amend their claims to include new claims for secret commission and breach of fiduciary duty.

The Respondent's submissions

59. **Black Horse and Close Bros.** These two Respondents led the response from all Respondents. They invited the Court to dismiss the appeals because appeals from case management decisions have a high threshold to overcome and the Judge was not plainly wrong, he was plainly correct. In particular, the Respondents submit that:

    (i) the Court of Appeal expressly considered the decision in this case in *Morris* at pars. 50 and did not disapprove it. On the contrary, Vos LJ, MR commented that in these actions under the CCA each case was legally distinct and turned on its particular facts (para. 50).

    (ii) The Claimants' counsel acknowledged during the CMC hearing that a decision in one lead case on the issue of whether the finance agreement was unfair under S.140A of the CCA would not bind the parties in any other case.

(iii) Even if a judgment in a lead case on the two common issues (breach of regulatory rules or agency) was binding on parties in following cases it would not determine the S.140A claims in those other cases because all of the facts and circumstances have to be taken into account.

(iv) In *Adams v MoD* [2024] EWHC 1966 (*Adams)*, Garnham J. and Master Davidson disaggregated the claims after certain decisions were made, and such disaggregation will be needed in these claims later if left joined.

(v) In *Abernethy v Barclays Banks* [2025] EWCC 1 (*Abernethy)*, HHJ Kelly reached a decision which matches what the Judge did in this case because of the need for fact specific determinations of each case.

(vi) In *Johnson*, the Court of Appeal reaffirmed the fact specific nature of the test in S.140A of the CCA.

(vii) In R (*Clydesdale FSL) v FOS* [2024] EWHC 3237 *(Clydesdale)*, Kerr J. resolved two of the Appellants' asserted common issues: a CONC interpretation issue and the deemed agency issue.

60. The Respondents rely on the Judge's findings of fact. He found that the Claimants' solicitors did not properly think through what was being proposed and were playing catch up. As to evidence, the Respondents state that there was no pre-action protocol correspondence nor any pre-action correspondence other than letters of claim. No indication was given of the omnibus approach. That the claim forms were served on 10.11.2022 with no particulars of claim. No indication was given of proposed case management directions and the Claimants applied to transfer to the High Court. The transfer application was dismissed. The Defendants raised severance. The Court ordered the Claimants to serve generic POCs and their response on severance. They did so relying on the undisclosed DCs but accepting that each case will turn on its own facts. After the transfer issue was determined the Court ordered the Claimants to serve proposals as to case management, the common issues and how to pick test or sample cases and how this will benefit the litigation. The Claimants did so in an inadequate manner and at the CMC on 5.5.2023 this was fully argued out. After a draft judgment and further submissions based on the recently handed down judgment in *Abbott*, the judgment was handed down.

61. In relation to the letters threatening new causes of action claims by other claimants (and some of the Claimants) sent by Barings Law just before the CMC, the Defendants highlighted that, in submissions, the Claimants, through their junior counsel, abandoned their rights to bring claims for secret commission and breach of fiduciary duty. However, the Defendants fear an application to amend the pleadings to include these new causes of action because the Appellants' skeleton stated such and they feared how that will affect case management. They submit that the Appellants cannot now succeed on the appeal due to their proposed amendment application which unfixes the grounds upon which the decisions at first instance were and on appeal will be based.

62. The Respondents relied on the recent decision not to permit joinder of claims, or omnibus claim forms, in *Abernethy* to support their defence to the appeal. Also at para. 27 in *Adams* Garnham J. commented that if the test cases will not be largely dispositive of the cohort of cases, but they will instead require individual determinations, a Court may be hesitant to approve omnibus claims forms. At para. 156(2) in *Abernethy* HHJ Kelly refused a GLO in PPI claims and refused an omnibus claim form where she found that there was limited utility trying test cases where individual fact specific assessments will be required in any event.

63. The Respondents place considerable stress on the fact specific, individualistic nature of a Court's determination of the issue of fairness under S.140A. So, they relied on para. 49 of the Judge's draft judgment in which he decided that although determination of the common issues "will assist", it will fall short of allowing the Court to be confident that it will dispose of the vast bulk of the claims. The Respondents asserted that the Judge preferred severance and then selection of lead claims on whether breach of CONC produced unfair relations in a range of circumstances. In the final judgment the Judge found that the decision on whether a breach of CONC would in principle give rise to unfairness was not complex and was unlikely to be useful or helpful in the following cases and it was questionable whether it would be binding. More importantly the Judge found that unfairness under S.140A was fact specific and relied on the decisions in *Harrison v Black Horse* [2010] EWHC 3152 (*Harrison)*, and *Plevin v Paragon* [2014] UKSC 61 *(Plevin).* HHJ Waksman QC at para. 50 of *Harrison* stated that the decision under S.140A allowed maximum flexibility when considering unfairness weighing different factors, and at para. 17 in *Plevin* Lord Sumption JSC stated that professional standards of conduct and breaches of those influence, but do not determine, unfairness under S.140A, which involves consideration of a variety of reasons which do not involve breach of duty. The Respondents relied on *Smith v RBS* [2023] UKSC 34, in which Lord Leggatt JSC highlighted the very broad range of relevant factors in a S.140A decision at para. 22. The Respondents relied on the Court of Appeal decisions in *Johnson* at paras. 20, 167 and 170, and *Self v Santander* [2024] Bus LR 1712 (*Self*), at para. 56. In *Johnson* the Court of Appea*l* stated that a relationship is not necessarily unfair under S.140A because DCs have not been disclosed to the borrower, the Court is required to consider all relevant matters and in *Self* (undisclosed PPI commission)*,* the Supreme Court stated that there is no criterion which will always determine the outcome in such cases. The Respondents relied on the following **18 Finch factors** set out in the skeleton of Mr Finch before the Judge and referred to at para. 39(c) of the judgment:

a) The date of the sale and the prevailing CONC rules;
b) Whether there was a commission;
c) If there was a commission, the size of the commission;
d) If there was a commission, the commission structure and, in particular, whether it involved a discretionary commission arrangement where the motor dealer could set the interest rate and which would in turn affect the commission paid to the motor dealer;

e) Whether the fact of the commission was disclosed by the motor dealer;
f) Whether the amount of commission was disclosed by the motor dealer;
g) Whether the fact of the commission was disclosed by the Lender;
h) Whether the amount of commission was disclosed by the Lender;
i) Whether the claimant should otherwise have been aware of the potential for commission;
j) The interest rate that was charged;
k) Whether the motor dealer increased the interest rate as a result of a discretionary commission arrangement;
l) What, if any, lower interest rate was available to the Claimant from the lender;
m) Whether there was any deposit contribution or other financial assistance provided by the lender, the motor dealer or any other third party;
n) Whether the hire-purchase agreement was settled early;
o) The history of the account and whether the Claimant maintained their obligations;
p) In the event of default, the actions taken by the lender;
q) Whether there was an intermediate broker; and
r) Whether there was any fee paid by the Claimant to the broker for the broking service.

Although the Respondents refused to take part in identifying any common issues, this list could be seen objectively as the Respondents' list of common factual preliminary issues, despite the fact that it was put forwards as a list of S. 140A factors to be weighed against trying common issues.

64. In relation to what level of commission detail CONC requires to be disclosed, the Respondents relied on the decision of Kerr J. in *Clydesdale*, at paras. 194 and 364, to submit that some of the common issues raised have already been determined. Those being: that what the CONC rules require is fact sensitive and that the dealer/brokers actions were attributable to the lender under S.56 of the CCA. However, tellingly, the Respondents did not concede the agency point in these actions. I very much doubt that, when the generic defence is served, the Respondents will accept that they are bound by Kerr J.s decision on agency. It seems far more likely that they will seek to argue that their factual matrix was different.

65. In relation to whether the Claimants claims are part of a "series of transactions" (the words used in the RSC Ord.15. R.4), the Respondents submit that they do not cover thousands of different finance contracts for different customers made with different dealers for different cars over many different years.

66. On procedure, the Respondents relied on *Assicurazioni v Arab Insurance* [2002] EWCA Civ. 1642 at para. 9 and *Abdulle v Commissions of Police* [2016] 1 WLR 898, at para. 28, to submit that this Court would have to find the Judge's decision perverse or plainly wrong to overturn it.

67. Overall, the Respondents submitted that managing and trying all the cases separately would be more convenient for disposal. The separate District Judge (or Circuit Judge) judgments arising would be just as helpful. There was nothing really to be gained by group case management or lead cases even on critical facts due to the broad nature of the S.140A discretion.

68. **Aldermore Bank and MotoNovo FL** (A&M). A&M submitted that the Judge was not wrong. He applied the correct test. The generic POC did not disclose significant common issues of fact, they only disclosed a common cause of action. Common causes of action are irrelevant to the joinder test. There were no case specific pleaded facts and matters other than failure to disclose DCs. At the hearing the Claimants only proposed one common issue: whether the regulatory regimes required disclosure to the borrower of the DCs. The Judge was right to decide that this issue fell short of one which the Court could be confident would dispose of the vast bulk of the claims and to decide that the new, post hearing, issue raised by the Claimants (an in principle decision would give rise to a finding of S.140A unfairness) was no better. Grounds 3 and 4 added nothing to ground 1. As for whether such decisions would be binding, the Judge assumed that they would be (para. 42). The Judge rightly used the test of convenient disposal to limit the omnibus claim form approach in these claims. Commenting on *Abbott* A&M noted that Master Davidson's reliance on CEFile issues and the need to be able to dispose of all claims at one trial, were overturned by the Divisional Court, who focussed on common issues and their significance to outcomes. Commenting on *Morris,* A&M submitted that all the "exclusion tests" identified in *Abbott* were rejected and instead the wording of CPR r.7.3 was re-imposed in its simplicity. The Court of Appeal did not criticise the result in *Abbott* and stressed that the old RSC Ord.15.r.4 criteria (common issues arising from the same or a series of transactions) would be persuasive for joinder, when satisfied. On G1: A&M submitted that the Judge considered the significant common issues but the Claimants only put one forward at the CMC hearing (the regulatory duty to disclose DCs). The Judge did not decide that issue was determinative, he considered whether it was useful or helpful and ruled it would have limited usefulness for determining the other disparate claims. The Vauxhall claims disclosed huge variability of facts: 118 different dealers; dealer contributions ranging from £0 to £4,440; commission ranging from £100 to £2,000; interest APRs varying from 2.88% to 22.31%. There was no "series of transactions". The Claimants asked the Judge to focus on CONC breaches so should not now criticise the Judge for failing to focus on other matters not raised. This arose shortly before the CMC because, on analysis, the Claimants found few cases relating to before April 2014. The Appellants' assertion that there was a common issue about whether a decision would in principle indicate unfairness was not raised at the hearing but only afterwards in written submissions. The Judge considered such to be of limited utility which was not wrong. A&M accepted it was possible it would assist but not probable. It would all depend on the 18 Finch factors. As for the "anterior questions" these were not raised at the hearing but only months after, as the Judge noted. Also, they were not permitted to be raised by

the Judge's ruling after the draft judgment the further submissions were allowed on matters arising from the decision in *Abbott* so he put a bar on re-opening other aspects. In any event these issues had been decided in *Clydesdale.*

69. **BMW and VW.** (B&V) summarised their own evidence. Broadly, 41% of their finance lending agreements had fixed commission; 5% had unclear commission and 54% had DC. They did not list the names of the Claimants who were subject to DC commission. The dates of transactions spanned 14 years were between 2007 and January 2021. The Judge's CPR R.7.3 decision was a matter of broad judicial discretion relying on Garnham J. in *Adams,* at para. 56. The test on appeal is to decide if the Judge's decision was wrong. B&V submit that the broad factual matrix (the 18 Finch factors) which is required to be considered for the S.140A decision undermines the whole appeal and supports the Judge's decision (relying on *Smith, Plevin, Self).* One factor, regulatory non-compliance, is not determinative. In any event the non-disclosure issue and the agency issues have been determined in *Clydesdale.* The Claimants only put forwards one common issue at the hearing: the regulatory breach by non-disclosure of DCs.

70. **Vauxhall.** Their submissions related to jurisdiction and so are not relevant.

Analysis of each Ground

Ground 1 (G1). The wrong test and error on common significant issues.

The test

71. It is clear from the judgment that the Judge applied the guidance in *Abbott.* He was bound to do so. However, that guidance no longer stands, it was overturned by *Morris* and as a result the approach taken by the Judge cannot stand. This was not a matter of mere form, it was a matter of substance. The breadth of the r.7.3 and 19.1 omnibus claim form jurisdiction is broad and the flexibility of the powers available to the case managing judges is wide. Omnibus claim forms are not GLO-light. They encompass the GLO criteria but are far broader. Having made that decision, it could be said that there is no need to consider the other grounds, but I shall do so for completeness and for understanding of the main decision and because I will make some case management directions.

Broad common issues

72. In paras. 44 and 51, the Judge decided that the two common issues raised by the Claimants were not sufficiently significant or common. Reading the judgment as a whole, it was not really in dispute that both regulatory breach and lender liability would be common issues. Neither of the Claimants' assertions on these was admitted or conceded by the Defendants. The Judge mentioned only those two broad common issues. He set them out in the judgment at paras. 34, 37 and 40. The first broad common issue related to whether the brokers/dealers breached the CONC guidance on conduct by failing to disclose the existence of or the nature of the commission they would receive from the lender. Initially the Claimants had included the OFT guidance too. This issue as proposed by the Appellants had two parts (1) determination of whether

there was a breach and (2) determination of whether that was unfair "in principle". The first part, was obviously a broad common issue, but standing back it will have within it many common sub-issues as the claims go forwards, after the generic defence is served and then as some specific particulars of claim are served and some detailed defences, the Court will be able to see more specific common issues. I set out the generic POC sub-assertions in paragraph 14 above. Each may be assumed to be denied. They cover interpretation of CONC, scope of CONC, what could be a breach of CONC in various factual circumstances (for instance full non-disclosure and partial non-disclosure).

73. The second part of this broad common issue was consideration of unfairness "in principle". The Judge was clearly correct to decide that generally "in principle" unfairness is unachievable and not a valid decision for a Judge to make unless all the facts are before the trial judge. But lead cases can be tried on all their facts, a matter which the Judge did not take into account. In principle unfairness focusses on one matter, defendant conduct, and ignores the full range of all the circumstances which need to be considered before an UR finding can be made. Were such a preliminary common issue to be tried that way a useful result on unfairness would perhaps only be achieved in a lead case if it was a *very clear case* as described in (*Plevin* and *Johnson*) or a *tipping point case* as described in (*Self*). So, the broad common issue would have to be properly defined. Nor do the generic pleadings assert "in principle" UR, they plead UR simpliciter. However, as the Judge himself explained in *Sunny,* if a breach of the code of proper conduct is established in relation to failure to disclose DCs, then that will give the lender a tougher task to discharge the burden of proof to show fairness.

74. The second proposed broad common issue related to whether the Defendants would be liable because the brokers/dealers were their agents (under S.56 CCA) for the brokers'/dealers' defaults due to the antecedent negotiations involving the brokerage agreements (the agency point). The Defendants did not seriously argue that this was not a broad common issue. Instead, they (rightly) complained that the way the Claimants developed their submissions on identifying common issues was messy, late and inconsistent. The Claimants' identified common issues from the pleadings were narrowed and then widened and one was only really stressed after the CMC hearing. That was less than ideal but this is case management, it should be active an cooperative. Messy submissions by any party do not change the existence of the broad common issues which were clearly set out in the generic POC, or the likely constituent sub-issues which I have cut up into bite size assertions in paragraph 14 above. Of course, after a generic defence is served, the Court and the Claimants will no longer have to guess what the generic common issues are. That is why dealing with a r.7.3 application without a generic defence and relevant crucial disclosure is, in my judgment, precipitous and unnecessarily difficult or inconvenient, particularly when the Defendants are not putting their cards in the table.

75. The Judge did not question the commonality of the issues relating to non-disclosure of DC and breach of the guidance but decided that there was insufficient commonality for

the agency issue (para. 40) to meet the requirements in *Abbott*. I respectfully do not consider that to be correct. At this very early stage one can only proceed on the basis that the Defendants deny all the generic assertions. Certainly, they were not prepared to concede any. So, it is clear to me that the agency issue and lender liability under S.56 of the CCA (para. 32 of the pleading in *Angel)* was a common issue on all claims. The fact that a Defendant, take Vauxhall who the Judge used as the example, used 18 dealers, is quite irrelevant to commonality on agency. So is the type of car or the size of the loan. It seems to me that, at this stage, before the Defendants were prepared to disclose any brokerage agreements, the only realistic assumption should have been that Vauxhall had a standard form of brokerage agreement for longish periods (maybe years) which they offered to dealers, some of whom signed up to it and offered their loans to lots of Claimants.

Significance

76. The decision which the Appellants really challenge is the Judge's determination of the insignificance or limited effect which decisions on the broad common issues in lead cases would likely have had on the following cases. The whole premise is based on an assumption relating to what will happen going forwards on the omnibus claim forms. That assumption appears to have been the selection of some lead cases to determine only the broad common issues identified by the Claimants at this early stage, not full trials of those cases, with the rest being following cases. That was a very narrow assumption and I do not consider that it was realistic. It ignored the flexible way in which an omnibus claim can properly be handled going forwards. The Judge did not consider the more likely situation. The brokerage agreements and leaflets and the consumer credit agreements should be disclosed before specific pleadings are ordered. The size of the commissions charged relative to the loans should be tabulated. The interest rate spread allowed to the brokers/dealers should be tabulated. Perhaps also the credit status of the borrowers should be tabulated (the status is usually categorised numerically between 1 and 1000). A sample of cases will then be chosen. The various preliminary issues for full trials (or just common issues) will only be chosen after early disclosure and specific pleading, covering all matters relevant to S.s140A&B. Those "lead trials" would decide the common issues, which would have been crafted with far more precision (precise lead issues, as Trower J. called them in *Moon),* further down the line after the specific pleadings in the chosen cases, and the correct redress. Looked at in this way, the significance can better be considered. The range of lead cases which the Defendants wish to choose may also encompass the creditworthiness of the borrowers in batches or the lender risk groups or other criteria. All such submissions will be relevant at a later case management stage.

Hypothetical

77. Let us look for instance at the omnibus claim form in *Angel*. There are 1,379 other Claimants and one Defendant, *Black Horse*, which has not disclosed how many brokerage agreements were involved. I do not assume that there were 1,379 different brokerage agreements. This cohort may involve say 100 or 500 claims relating to one

specific *Black Horse* brokerage agreement with one specific information leaflet given to consumers by dealers/brokers. Or if we took the percentages in evidence from one of the Respondents, 54% of the brokerage agreements are admitted as paying DC. Setting aside what was said by the dealers/brokers verbally, the lead cases could provide the Court's rulings on: the interpretation of the wording of the DC brokerage the main agreement and the leaflet; whether actual disclosure of any commission was provided by these documents (is it a "may pay commission" clause? Or is it silent?); whether disclosure of the DC was provided in the documents; the precise scale of the interest rate discretion spread (who knows? 0.25% or 15%); the relative size of the commission to the size of the loan; interpretation of CONC; whether the documents breached CONC; interpretation of the scope of CONC and whether a S.56 CCA agency liability is to be imposed on the lender. The rulings could also determine those matters in the context of risky borrowers with a poor credit history (under 560/1000) and cast iron borrowers with a good credit history (over 961/1000). On those documents, those decisions will provide powerful persuasive guidance in the following claims where the same brokerage agreement and leaflet were used. Certainly, the decisions will not fully determine whether there was an unfair relationship in the following cases, but I do not understand why they would not be persuasive, perhaps very persuasive. The range of Claimant circumstances and of remedies granted would also emerge on those issues. In discussion, two classic examples were considered. The buyer of a jalopy for £2,000 with a loan of £1,000 and an interest spread of 0.25%. At the other end the Bentley buyer borrowing £100,000 with an interest rate spread of 15%. Furthermore, if the case management judge so orders, the decisions may bind the specific cohort of following cases on the specific common issues, who contracted under the same (undisclosed) brokerage agreements. I am not setting out rules or even suggested rules. I am setting out foreseeable options for convenient case management. Omnibus claim management of that cohort will potentially reduce 500 or 100 CMCs and trials to perhaps a just a few.

78. In my judgment, there is more to significance than mere bindingness. It involves also persuasiveness and practicality. In any event significance is not the test, convenient disposal is the test.

79. As for the Respondents' submission, accepted by the Judge at paras. 37 and 39, that unfair relationship (UR) decisions can only be determined at trial by taking all relevant factors into account in a S.140A&B claim, that was never in dispute. The Supreme Court rulings are clear. Subject to the "*very clear case"/"tipping point"* examples, all cases are only going to be finally determined, or more likely settled, by such an analysis. However, once lead cases relating to, for instance, batches of identical brokerage agreements, batches of similar interest rate spreads and/or batches of consumers with similar credit ratings are decided and redress is granted, I do not consider that it can be concluded that the decisions in those lead cases will have no significant effect on the following cases in relation to the common issues, similar batch UR or indicative redress levels. If a circuit judge decides that the *Black Horse* brokerage agreement in *Angel*

complied with CONC and that *Black Horse* were not liable (under S.56 of the CCA) for any breaches of duty by their dealers under that agreement, it would be a remarkable and brave decision for a Claimant in a following case to wish to climb that wall and re-litigate those issues again on the same brokerage agreement, without some specific evidence of different verbal statements by the dealer. Likewise, for decisions the other way round. For these reasons I place more weight on the significance of the broad common issues and objectively can foresee that they will later be split into clearer, precise issues, which will have significance for following cases in their cohorts. Omnibus case management could also include a binding result direction for specific issues in batches of cases on the same standard brokerage agreements.

80. The Respondents relied on para. 50 of the judgment of Vos LJ, MR in *Morris:*

> "50 We were referred to the decision on Judge Worster in the County Court at Birmingham on 8 September 2023 in *Angel v Black Horse Rock Ltd (unreported)* 8 September 2023, where he decided that it was not convenient on the facts of that case for multiple claimants to be joined in a single set of proceedings. All the individual claims demanded a separate evaluation of whether the separate relationship between the claimant and the defendant was unfair within the meaning of section 140A of the Consumer Credit Act 1974. No joint remedy was sought, and each claim was legally distinct and turned on the particular facts of the case, and a finding in one case would not bind the situation in another (see paras 19—22, 36 and 42 of Judge Worster's decision). The facts are quite different here, where there are common issues as the judge found. It seems likely at least that findings on the common issues the judge identified will apply to, and depending on the precise nature of the issue and any further orders made, bind all the claimants."

Firstly, there is no mention that the Court of Appeal were told that *Angel* was under appeal. I very much doubt that, had the Court of Appeal known that it was, such a paragraph would have been written in the way it was, if the Master of the Rolls had thought that the Respondents would be submitting that he was trying to determine this appeal. Secondly, the MR was using *Angel* as an example of a case management decision, not a binding principle in all omnibus claim form cases concerning Ss. 140A&B. Thirdly, no joint remedy was sought in *Adams* or *SAM* or *Breeze* or *Thompson* or *Sunny*. Fourthly, whilst the remedy will turn on the particular pleaded facts and matters, the common cause of action in these cases has within it significant common issues in my judgment which, if case managed together and determined in lead cases, will at least be persuasive and at most potentially binding on similar batches of claims, such as to lead to likely mass multi case settlement, which will be convenient disposal. Fifthly, it is not correct to state that all these claims were legally distinct and demanded separate evaluation, that was merely a summary of the Judge's decision.

81. Having submitted that the decisions in lead cases on common issues would not bind in the following cases, the Respondents submitted that the decision in *Clydesdale* bound the parties on two common issues. I do not accept that the non-disclosure issues or agency issues are fully determined by the judgment of Kerr J. in *Clydesdale*. It will be persuasive but the precise issues in that case may not be the same as the facts and matters which may emerge in the claims herein. In any event *Clydesdale* was a judicial review of FOS decisions, not an appeal from a judge's decision.

82. I consider the Judge's decision on the significance of the determination of broad common issues identified from the omnibus pleaded claim was wrong because it rested on the *Abbott* test and it did not take into account the early stage of the claims and the likely future range if more precise common issues. What was needed was to compare omnibus lead case decisions with decisions of Deputy District Judges if the cases are separated. Those will arise randomly. They will not be in batches relating to the same brokerage agreement. Such decisions are not usually reported in the online law reports at all. One minor point is: are the Claimants' solicitors or the Defendants expected to obtain transcripts of small claims decisions (with perhaps no fee remission) and then to rely on those in the next case?

G2: the binding effect of decisions on common issues.

83. The Judge doubted that the decisions in sample cases would be binding on following cases without a direction to that effect (para. 42). In any event the Judge assumed bindingness in para. 42 but considered that the effect would be *limited* because any decision on unfairness would be in principle and would not determine UR under S.140A for other claimants.

84. I think that the focus on "in principle" led to confusion. The binding nature of a decision in a test case on all or most of the other following cases is relevant to but not determinative of the CPR R.7.3 convenient disposal decision. *Morris* makes it clear that it is not the only factor nor is it an exclusionary factor. All parties accepted that, whether under an omnibus claim form or separate ones, the parties in the following cases would not be bound in relation to a decision under S.140A, whether contained in a lead omnibus case or first heard, route one case. However, that general principle ignores the choice of level of judge, which can be carefully managed under the omnibus claim form route. It ignores issue estoppel, if such a case management order is made, and it ignores persuasiveness. Also, the Judge only considered the two broad common issues and did not consider the precise issues which will likely be identified once a generic defence is served and some claims are specifically pleaded out. I consider that approach to have been too narrow.

85. Let me take the hypothetical example in paragraph 77 above and turn it the other way around. In a lead case, let me assume that Mr *Angel* has won and *Black Horse* have lost. Let me assume that the decisions taken are: (1) the communications between broker/dealer and the Claimant were an antecedent arrangement under S.56 CCA so

Black Horse are liable for the dealer's conduct and omissions; (2) the credit agreement and the leaflet did not disclose to Mr *Angel* that his interest rate was 5% higher than it could have been and funded a large DC to the dealer; (3) the dealer's and lender's conduct were breaches of CONC; (4) the dealer breached his duty of impartiality to the consumer; (5) the size of the DC compared to the size of the loan and the failure to inform *Mr Angel,* together with his relative lack of financial sophistication (I mean no disrespect, this is a hypothetical, not based on evidence), all his personal circumstances and the 18 Finch factors, made the consumer credit agreement an unfair relationship; and (6) redress is granted refunding the commission to him in full and half of the interest he paid under the loan. Then let me assume that there are, say, 99 or 499 other Claimants who took loans under the same brokerage agreement and entered credit agreements which were on the same standard terms. The case managing judge could fairly have decided before the trial that the decision on issues (1) to (4) would be binding on all the other 99/499 Claimants. Certainly that would not finally dispose of the following cases, because issues (5) and (6) remain, but it would promote settlement. Parallels can then be drawn with the personal circumstances of other Claimants. Even if the decisions are not determined as binding, their persuasiveness is a relevant factor for r.7.3.

86. I consider that the Judge's decision as to the limited effect on following cases of any decisions on broad common issues in lead cases was wrong. It was also too narrow in scope and the test he applied under *Abbott* gave too much weight to his findings on limited effect. I do not consider that his decision on the significance of binding decisions on the likely range of precise common issues gave sufficient weight to them because he did not consider them at all and did not consider the flexible case management options within omnibus management.

87. **G3: the significance of decisions on common issues.** I have dealt with this issue above under G1 and G2. The identified common issues are only broad at present. Once they become specific then lead cases can be identified and tried first. Whether the issues are made binding is up to the case managing judge on submissions. If they are not made binding then they will, in my judgment, be persuasive in relation to the same brokerage agreements and perhaps more widely. The appropriate level of judge can be allocated to the lead cases so that they are properly determined according to their complexity and be reported. That will not happen for separate cases, which will be dragged into the small claims track or the Fast Track because value will heavily influence allocation. I consider that decisions under the omnibus route, by the appropriate level of judge, will at least be persuasive in relation to CONC breach, agency and many likely precise sub issues.

G4: overriding objective.

88. At para. 27 of the judgment the Judge expressly considered the overriding objective and the parties' submissions on the different consequences of omnibus claims and separate claims and weighed these in the balance. However, because he specifically focussed on

the omnibus route needing to result in only a "small rump of cases" which were not finally disposed of by the decisions of the lead cases, and because he focussed on only broad common issues, and because he was applying the *Abbott* test not the *Morris* test, the decision cannot stand. I set out the relevant factors below.

The factors

89. I consider that, pursuant to *Morris* and CPR 52.21, this Court should exercise the discretion in CPR rs. 7.3 and 19.1 afresh. The choice at this early stage, based only on the generic POC, is between separate claim forms and continuing with omnibus disposal. The factors which I take into account are as follows:

(i) *Whether there are multiple claimants suing the same Defendant or multiple Defendants.* These are single Defendant claims. That weighs in favour of omnibus disposal.

(ii) *The number of claimants.* There are over 5,800, which weighs in favour of omnibus disposal.

(iii) *Whether the claims relate to the same matters or different matters (see Adams).* I consider that the pleaded claims relate to the same or similar matters. It is pleaded that each Claimant entered a consumer credit agreement on (various) standard terms from the same Defendant, for a car, at an interest rate determined by the dealer/broker, under the Defendant's brokerage agreements (which I infer were probably on the Defendant's standard terms), involving DC. Each claim involves common, broad allegations. Each is made under S.140A&B of the CCA. This weighs in favour of omnibus disposal.

(iv) *Whether the claims involve the same causes of action.* In these claims they all contain the same cause of action. This weighs in favour of omnibus disposal.

(v) *Whether the issues as set out in the generic POC are common issues.* As identified above there are broad common issues and within those are likely to be many specific common issues across all the claims and some common issues specific to bundles of claims. This weighs in favour of flexible omnibus disposal.

(vi) *Whether the case specific claims and defences raise common issues of law or fact.* It is very likely that the specific claims will raise common issues relating to facts and matters and law. Some sorts of likely specific common issues were identified in the Claimants' March 2023 sampling proposals. I have identified some above. This will probably weigh in favour of omnibus disposal.

(vii) *Whether decisions in lead or test cases will be significant for the disposal of following cases so that they will either bind the parties (issue estoppel) or be persuasive in the disposal of issues in the following cases (for example breach of regulatory guidance, agency liability, interpretation of brokerage agreements, the very clear case point, or more generally: breach of duty, breach, liability, causation or quantum).* I consider that omnibus disposal will assist in the appropriate choice of lead cases to determine the common broad and specific issues (to be determined later). Separate claims would make choosing lead cases less likely (or not likely at all as the Judge envisaged it) and

so random early trials would occur instead of lead case early trials. The significance of the lead case decisions would at least be persuasive. Choice of lead cases would lead to a greater likelihood of solving the main issues early and so settling following cases than random determination of early cases. Omnibus case management would be capable of enforcing issue estoppel on the parties for specific common issues which would be significant. This weighs in favour of flexible omnibus disposal.

(viii) *Whether the overriding objective is better met by route one or route two, taking into account the requirement to deal with cases justly and at proportionate cost; seeking to ensure equal footing, full participation, saving expense, proportionality to the sums involved, the complexity the importance of the case and the financial positions of the parties; whilst allocating an appropriate share of the Court's resources and enforcing compliance with the rules.*

(1) The omnibus route would favour access to justice for those Claimants with Small Claims Track and Fast Track claims. There is an imbalance of financial power between individual Claimants and the Defendants.

(2) The omnibus process will disadvantage the Defendants on Claimant legal costs because, by the separate route, many claims will be on the Small Claims Track so that they would pay no Claimant's legal costs (I assume they would send advocates and pay lawyers to defend each case so would incur their own legal costs), but may save costs overall due to the increased prospects of settling following cases once lead cases are tried. Fewer CMCs would be required by taking the omnibus route, but those which are held would cost much more. The redress sums involved are likely to be small in some cases but I have no evidence of how large or small overall the range will be and redress may be more than just the DC paid.

(3) Disclosure will be more focussed with the omnibus route and far better timed. Very early disclosure of the brokerage agreements, any accompanying leaflets and the credit agreements should probably be ordered either with the generic defence or soon after, in any event before specific POCs are pleaded. Otherwise amended pleadings will be needed after these documents are disclosed which would increase the costs substantially. In separate claims, disclosure would occur after the pleadings close, which would lead to amended pleadings and more cost. In any event, disclosure would be more limited with individual small claims. This factor weighs in favour of omnibus disposal.

(4) Court fees will be lost to the Courts by the omnibus route but the Lord Chancellors' Department or Government has the power to set and choose the level of the fees for omnibus claim forms if that is what they choose. Fee income concern is not a matter for me as a Judge. This is neutral.

(5) CEFile issues, as highlighted in *Adams,* are a concern but can be resolved early on by allocating individual case numbers to individual

claims once lead cases are to be pleaded specifically, perhaps after early disclosure and questionnaires have been filled by both parties for each claim. This is neutral.

(6) It is likely that fewer judge hours will be required for the omnibus route in both trials and CMCs than for the separate claim route. Appeals of CMC orders may delay all the claims if they are given permission. However, predicting appeal numbers and times is fruitless. This factor favours omnibus disposal.

(7) If expert evidence is required to show lending rates at the time for similar car finance, or for credit status, expert evidence in the omnibus claims would be common whereas in separate claims it might not be allowed in small claims and could be disproportionately expensive in a single Fast Track claim. This weighs in favour of omnibus disposal.

(8) Separate disposal would lead to conflicting decisions.

(9) Overall, in my judgment, the balance of the overriding objective factors favours the omnibus route.

(ix) *Whether all or some of the claims will more conveniently be disposed of together.* At this early stage I am firmly of the view that omnibus case management is the more convenient route to dispose of these claims and so the Judge was wrong to separate the claims. I do not take this decision just as a difference of view.

90. I consider that the high threshold for appeals of case management decisions is passed.

Conclusions

91. The Judge was very experienced in civil litigation and in consumer litigation of this sort. He followed Divisional Court authority which was binding on him. He handled the CMC with care and patience and waited for the outcome in *Abbott.* However, since then, the Court of Appeal has given clear guidance in *Morris* and the test the Judge applied from *Abbott* was not the correct one. For that reason and because I uphold the appeal on all 4 grounds, the order he made will be overturned and the case will be remitted to the Judge for case management under the omnibus claim form.

92. I set aside the Judge's ordered made on 24.11.2023.

93. There will need to be a consequentials hearing to determine costs and any necessary directions. I think a time estimate of 2.5 hours would be appropriate. I have in mind ordering disclosure of all of the brokerage agreements, credit agreements, accompanying leaflets and the service of a generic defence within 3 months. I also have in mind making an order for costs in the case because this is case management. On all these matters and other matters I will decide after submissions at the consequentials hearing.

END